No. SC86035

IN THE SUPREME COURT OF MISSOURI

ERIC HUMPHREY,

Plaintiff/Respondent

v.

CHARLES GLENN and DALE GLENN d/b/a C & D GLENN FARMS,

Defendants/Appellants.

Appeal from the Circuit Court of Mississippi County, Missouri
Honorable David A. Dolan, Circuit Judge

APPELLANTS' SUBSTITUTE REPLY BRIEF
CHARLES GLENN and DALE GLENN d/b/a C & D GLENN FARMS

ALBERT C. LOWES #17061
LOWES & DRUSCH

2913 Independence
Cape Girardeau, MO 63703
Telephone: 573-335-7200
Facsimile: 573-335-8423

Attorneys for Appellants
Charles Glenn and Dale Glenn d/b/a C & D Glenn Farms

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ARGUMENT

I.

The trial court erred in denying the Defendants' motion for directed verdict and motion for judgment notwithstanding the verdict because (1) Defendants did not owe plaintiff any duty with regard to the condition of their land, (2) Plaintiff failed to prove any recognized exception to the general rule that possessors of land are not liable to trespassers for conditions on the land, and (3) Plaintiff failed to make a submissible case under the exception stated in the Restatement (Second) of Torts, § 335 in that (1) Plaintiff was a trespasser, (2) Section 335 of the Restatement (Second) of Torts has not been adopted in Missouri, and (3) the facts do not fit the requirements of § 335 as there was (a) no evidence of constant trespassers in the limited area where plaintiff was injured, (b) the wire cable in and of itself was not a dangerous condition likely to cause death or serious bodily harm to trespassers but rather it was plaintiff's conduct that caused the danger, (c) the wire cable was not a hidden peril and was discoverable by trespassers and (d) the wire cable was a condition inherent to farm land in the area and it was readily observable by a trespasser paying proper attention to his surroundings.

In response to Point I, Respondent claims that the record "clearly demonstrates" support for all of the requirements of the Restatement (Second) of Torts, § 335 and therefore, support for the verdict and the trial court's denial of the motion for directed verdict and motion for judgment notwithstanding the verdict. (Resp. Br. 16, 17, 18)

However, a review of the testimony or evidence relied on by Respondent in support of each requirement shows otherwise.

(1) knowledge of "constant" trespassers on a limited area of land

Respondent contends that "[t]he record clearly demonstrates that Defendants knew or should have known that trespassers constantly intruded upon the South entrance to Greenfield." (Resp. Br. 16) In support of this contention, Respondent offers four points of testimony. (Resp. Br. 16) However, Respondent has taken the testimony out of context, misstated the testimony, and more importantly, the testimony does not support his contention. The testimony offered in support of Respondent's contention does not establish that the Appellants/Defendants had knowledge of, or even that there were, constant trespassers upon the area where the wire cable is across the private road where Plaintiff was injured or even in the larger area of the South entrance to Greenfield.

First, Respondent points to the testimony of Robert Dale Glenn. (Resp. Br. 16) In fact, Robert Dale Glenn testified that since 1994 they have had "constant problems" with trespassers on Greenfield and have trouble everywhere they farm. (Tr. 124-125, 137) He was not asked, and did not testify as to, whether there were constant trespassers specifically upon the area where the Plaintiff was injured or on the private road of the South entrance to Greenfield. As a result, his testimony offers nothing as to the pertinent issue.

Second, Respondent points to the testimony of Charles Glenn. (Resp. Br. 16) In response to plaintiff's attorney's question "But somebody would constantly tear something out, wouldn't they" Charles Glenn answered "They knew it was there. They

would be pulling it out with a pickup truck." (Tr. 198) It is clear from this question and answer that Respondent has not accurately stated the testimony in his brief when he claims that "Charles Glenn testified . . . that trespassers were 'constantly' tearing off signs from the wire cable and tearing out the cable." (Resp. Br. 16) As a result, this testimony offers nothing as to the pertinent issue.

Third, Respondent points to the testimony of Burke Dodson. (Resp. Br. 16) Burke Dodson is the owner of Greenfield and he leased the property to Charles Glenn and Robert Dale Glenn in 1994. (Tr. 22-23) The testimony of Dodson referenced by Respondent is regarding a period of time starting sometime in the 1960s until sometime before the property was leased in 1994, while Dodson was farming the property, that he had installed and maintained a wire cable across the road right off the levee. (Tr. 23-27) Testimony related to a different cable, in a different location, at a time some 6 to 40 years ago is irrelevant to the pertinent issue. In addition, Dodson's knowledge of trespassers on Greenfield prior to 1994 when he was farming the land is not relevant to the question of whether in October 2000, before the plaintiff's injury, Charles Glenn and Robert Dale Glenn had knowledge of constant trespassers specifically upon the area where the Plaintiff was injured or even on the private road of the South entrance to Greenfield. As a result, this testimony offers nothing as to the pertinent issue.

Finally, Respondent points out that the purpose of installing the wire cable at the South entrance to Greenfield was to prevent trespassers from coming onto the land. (Resp. Br. 16) Although the citations to the transcript regarding the Dodson cable are irrelevant, Respondent is correct that the point of a wire cable across a private road on

private property is to prevent trespassers from entering the land. In fact, like most field roads on farms coming off the levee, the field road at both the North and South entrance of Greenfield have a wire cable across the road to keep out trespassers. (Tr. 43-44, 98, 115, 141, 168, 191-192) However, these facts do not show that Charles Glenn and Robert Dale Glenn had knowledge of constant trespassers specifically upon the area where the Plaintiff was injured or the South entrance to Greenfield. It merely establishes that they did not want trespassers on the property. As a result, this testimony offers nothing as to the pertinent issue.

At best the testimony referenced by Respondent shows that there were trespassers on Greenfield. **Greenfield consists of 420 acres**. (Tr. 52) This falls far short of the Plaintiff's burden to prove that the defendants had knowledge that "persons constantly and persistently intrude upon some ***particular place within the land***." *Seward v. Terminal R.R. Ass'n*, 854 S.W.2d 426, 429-430 (Mo. banc 1993)(emphasis added). This is the lynch pin to the exception stated in § 335 of the Restatement (Second) of Torts, because it is from this knowledge that the duty arises. Knowledge that persons persistently roam at large over an area of land is not sufficient to create a duty. *Seward*, 854 S.W.2d at 429-430.

Based on the foregoing, the evidence did not establish that the Defendants had knowledge of, or even that there were, constant trespassers upon the area where the wire cable is across the private road where Plaintiff was injured or even in the larger area of the private road of the South entrance to Greenfield.

(2) the condition is one which the possessor has created or maintains and to his knowledge, is likely to cause death or serious bodily harm to such trespassers

Respondent contends that "[t]he record clearly demonstrates that the Defendants installed the wire cable at the South entrance to Greenfield and that the Defendants knew the wire cable at the South entrance created a dangerous condition likely to cause death or serious bodily injury." (Resp. Br. 17) It is not disputed that the Defendants installed the wire cable. However, it is disputed that the wire cable is a condition likely to cause death or serious bodily harm. Again, Respondent points to a few items of testimony that ultimately do not support his contention.

First, the fact that Robert Dale Glenn answered yes when asked by plaintiff's counsel "you knew this wire cable was across the road and was a dangerous condition without any warnings on it" (Tr. 142) is ambiguous. What does dangerous mean in that context? More importantly, § 335 of the Restatement (Second) of Torts does not refer to a "dangerous condition" but rather there must be proof of a condition that is likely to cause death or serious bodily injury.

Second, Robert Dale Glenn did testify that he knew that people had operated three-wheelers and four-wheelers on the property. (Tr. 127-128) However, this does not make the wire cable a condition likely to cause death or serious bodily harm. The wire cable would not cause harm to a person walking on the property, a person driving a car or truck, or even a person operating an ATV who was paying attention to his surroundings. It was plaintiff's reckless behavior in trespassing on another's land, failing to keep a

careful lookout, and driving into the wire cable at an excessive speed while operating a four-wheeler that caused the serious bodily injury.

Consider a more obvious example of the distinction between the condition being likely to cause death or serious bodily harm, in and of itself, compared to plaintiff's behavior causing the serious bodily harm: A landowner has a large mound of soil on his property and a trespasser on a motorcycle or four-wheeler enters the property and begins using the mound as a ramp and has an accident and is seriously injured. Certainly, the mound of dirt was not a condition likely to cause death or serious bodily injury, but rather it was the trespasser's behavior that caused the serious bodily injury.

In this case, only if the Defendants assumed that one trespasser would come along and somehow alter the anchor on the wire cable so that it was no longer anchored down and then another trespasser would operate a four-wheeler at an excessive speed on private property and drive into a plainly visible wire cable because he was not paying attention – *only assuming those facts*, could the Defendants know that under those circumstances the wire cable could cause serious bodily injury. However, as stated in *Comment f* to § 335 of the Restatement (Second) of Torts: "The possessor is entitled to assume that trespassers will realize that no preparation has been made for their reception and will, therefore, be on the alert to observe the conditions which exist upon the land."

Based on the foregoing, the wire cable was not a condition that itself was likely to cause death or serious bodily injury.

(3) the condition is of such a nature that he had reason to believe that trespassers will not discover it – "hidden peril"

Respondent contends that the record clearly demonstrates that the wire cable was not discoverable. (Resp. Br. 18) The Respondent offers no testimony that the wire cable could not be discovered by a trespasser. The best he offers is that one person testified it "would be hard to see." (Tr. 129) Obviously this means that it can be seen, you just have to be paying attention. Respondent, however, equates this to a "hidden peril."

Respondent is asking that a higher standard of duty be applied for a trespasser than the duty for a licensee or an invitee. That is certainly not the law. The duty to a licensee or an invitee applies to dangerous conditions, defined as defects or conditions that are in the nature of hidden dangers, traps, snares, pitfalls, and the like, not known and that would not be observed in the exercise of ordinary care. *Cook v. Smith*, 33 S.W.3d 548 (Mo.App.W.D. 2001); *Workes v. Embassy Food Enterprises, Inc.*, 592 S.W.2d 864, 967-868 (Mo.App.E.D. 1979). There is no duty to a licensee or invitee where the condition is open and obvious and the risk of harm exists only if the plaintiff fails to exercise due care. *Id.*; *Poloski v. Wal-mart Stores, Inc.*, 68 S.W.3d 445, 450-451 (Mo.App.W.D.2002).

The question is whether, in the exercise of due care, the plaintiff could have discovered the wire cable. Josh Nelson, the passenger on the ATV operated by plaintiff's brother saw the cable. (Tr. 86) The passenger on plaintiff's ATV saw the cable. (Tr. 69, 81) Charles Glenn testified that the cable was pretty visible and that it had been there since 1994 and that no one had ran into it before the plaintiff. (Tr. 198) While it is true

that the plaintiff testified that he did not see the cable, the jury found that he failed to keep a careful lookout, a finding not contested on appeal. (L.F. 63, 76)

Based on the foregoing, the wire cable was not a "hidden peril" that could not be discovered in the exercise of due care.

(4) the possessor has failed to exercise reasonable care to warn trespassers of the condition and the risk involved

Respondent alleges that the true issue of this case was whether the Defendants exercised ordinary or reasonable care to warn trespassers of the wire cable at the South entrance to Greenfield. (Resp. Br. 18) Respondent maintains that they did not. In his argument, Respondent misstates the burden of proof and ignores pertinent law. In addition, Respondent offers incomplete and inaccurate statements of testimony.

First, Appellant disputes Respondent's allegation that this was the true issue of the case. The most important and critical issue was the question of duty, and for the reasons set forth above, the Plaintiff failed to make a submissible case establishing a duty. Plaintiff/Respondent has attempted and continues to attempt to improperly shift the burden of proof to the Defendants/Appellants. As a trespasser, Plaintiff was owed no duty and it was his burden to prove that the facts supported an applicable exception. *See* *Seward*, 854 S.W.2d at 428. It was also his burden to prove breach of duty.

Contrary to Respondents' claim that "the Defendants offered no evidence of taking any other precautions," (Tr. 17) it was the Respondents' burden to prove the breach of duty, not the Defendants' burden to prove that they did not. On this issue, the Respondent ignores the pertinent law. While Respondent relies on § 335 of the

Restatement (Second) of Torts for his claim, he fails to address the comments explaining the duty to warn. *Comment e* states:

> The duty which the rule stated in this Section imposes upon a possessor of land is not an absolute duty to warn the trespasser of even highly dangerous conditions. It is a duty merely to use reasonable care to give a reasonably adequate warning. In determining whether reasonable care has been used, the burden of giving a warning adequate to prevent the particular harm which the trespasser sustains is to be compared with the risk to him involved in the absence of warning. This includes the chances that, unless warned he will come into contact with it and the gravity of the harm which he will sustain if he does so.

Restatement (Second) of Torts, §335, comment e. In addition, *Comment f* explains that the Defendants were entitled to assume that trespassers would be on the alert to observe the conditions which exist upon the land. In addition, they were entitled to assume that they will be particularly careful to discover dangerous conditions which are inherent in the use to which the possessor puts the land. *Comment f, Restatement (Second) of Torts, §335*.

Second, Respondent erroneously states that "[o]ther than attempting to keep warning signs on the wire cable at the South entrance to Greenfield, the Defendants offered no evidence of taking any other precautions." (Resp. Br. 18-19) Respondent then contends that if the Defendants had placed a post, painted purple, at the South entrance like they did at the North entrance "it is likely this accident never would have occurred." (Resp. Br. 19) However, Defendants did offer evidence of other precautions

including numerous trees on the South entrance that had purple paint on them. (Tr. 35-36, 40-42, 45-48, 62, 126-127, 139, 198-199, 206) In fact, a look at the post at the North entrance (Exhibit R) versus the trees with purple paint on the South entrance (Exhibits E, F, G, H, J, and P) shows that the trees with the purple paint are far more visible and noticeable than the post. (A1 – A6)

Third, Respondent's claim that the mere location of the wire cable at the South entrance shows lack of reasonable care is without merit. (Resp. Br. 19) The testimony showed that the location was chosen because it was the best place to hang the cable between the trees and it is close to the end of the road going into the field. (Tr. 132-133) Common knowledge tells us that trees are going to be more stable and sturdy than a post stuck in the ground even with concrete. It would take a lot more effort to down a tree to remove a cable than it would to pull up a post. The testimony also showed that the location of the cable is far enough from the levee that it is clear that it is a field road and that it is private property. (Tr. 25)

Further, it is obvious from Defendants' Exhibits N and O that an alert trespasser would see the cable in and of itself regardless of all the purple paint warnings on the trees to alert people not to trespass. (A4, A5) Moreover, considering the facts that (1) it is common knowledge that landowners use cables, gates, barricades, and the like to keep people from trespassing on private field roads on farmland (Tr. 43-44, 98, 115, 141, 168, 192); (2) the Defendants marked their property with purple paint to warn people not to trespass (Tr. 35, 40-42, 45-48, 62, 126-127, 139, 198-199, 206); and (3) an alert

trespasser would see the cable, the Defendants did not breach the duty to warn set forth in § 335 and comments *e* and *f*.

Based on the foregoing, it is clear that the Plaintiff/Respondent failed to prove that the Appellants/Defendants failed to exercise reasonable care to warn trespassers of the condition and the risk involved.

Connecticut case

Finally, Plaintiff/Respondent offers this Court a 1966 Connecticut case as an example of "a jury verdict (based on section 335) with a very similar fact pattern" in support of his argument. (Resp. Br. 20) In the Connecticut case, *Lucier v. Meriden-Wallingford Sand and Stone Co.*, 216 A.2d 818 (Conn. 1966), a motorcyclist drove into a cable barrier across a private road – and that is where any similarity with this case ends. In addition to the fact that *Lucier* is a Connecticut case with no precedential value in Missouri, it is significantly distinguishable both legally and factually. In *Lucier*, the Connecticut court summarily found that the jury verdict could be upheld based on § 335 of the Restatement (Second) of Torts *or* § 367 (the hard by rule). *Lucier*, 216 A.2d at 822. It seems the jury was instructed on various theories and based on the facts, could have based its verdict on § 367 - the hard by rule. *Id.* at 820.

In *Lucier*, the road was open during the week while the defendant's facility was in operation and vehicles passed freely along the road. *Lucier*, 216 A.2d at 821-822. The road was traveled by persons going to defendant's facility as well as persons going to and from a trailer park. *Id.* The defendant had knowledge of this use of the road. *Id.*; *see also Maffucci v. Royal Park Limited Partnership*, 707 A.2d 15, 21 fn 10 (Conn. 1998). The

road connected two public highways and was apparently not distinguishable as a private road. *Id.* The motorcyclist had driven on the road to visit his brother at the trailer park, albeit all of his prior trips had been during the workday when the road was not blocked. *Id.* The only warning was a sign on a telephone pole reading "Private Property Keep Out." *Id.* Based on the description of the road as yellow-brown in color, the cable as dark brown, the roadside bushes as brown, and a slight rise in the road just south of the cable, it would seem that the cable could not be seen at night. *Id.*

The foregoing facts from *Lucier* show that it was not apparent that the road was a private road, that the road was open during the day and constantly traveled by various people, that persons traveling the road could have reasonably believed it to be a public highway, there was no reason for a person traveling the road at night to anticipate that there would be a cable across the road, and there was no warning of the cable and it was not inherent to the use of the land. Undoubtedly, the motorcyclist did not even know he was trespassing and even keeping a careful lookout could not have seen the cable.

Clearly, the *Lucier* facts are not at all similar to the facts of this case showing: a private road on farmland, that is clearly private property and is marked with purple paint to warn trespassers; the plaintiff knew he was trespassing; it is common knowledge that landowners use cables, gates, etc. to block private roads on farmland; the plaintiff knew that farmers use cables, gates, etc. to block private roads and had just encountered a cable across another private road on the same farmland; and the cable could be seen if the plaintiff had been paying attention. Unlike the *Lucier* case, there is nothing deceptive or hidden about the cable on the Appellants/Defendants' property. The private road on

Appellants/Defendants' farmland is access to their farm -- it is not situated between two public highways, it is not a means of access for the public during the day only to be closed at night, it is not a travel way to a trailer park or a large facility with numerous employees, and it would not be mistaken for a public highway. The situation, the surroundings, and the circumstances of this case and *Lucier* are not at all similar. As a result, *Lucier* offers no guidance for this case and Respondent's reliance on that case is misplaced.

Summary

Contrary to Respondent's contentions, the record does not "clearly demonstrate" support for all of the requirements of § 335 of the Restatement (Second) of Torts. Instead, the record clearly demonstrates that, even if § 335 has been or is adopted by this Court, the testimony and evidence offered in this case does not meet the requirements of that exception to the general rule that possessors of land are not liable to trespassers for conditions on the land. As a result, Respondents' claim fails, there is no support for the verdict, and the trial court erred in denying the motion for directed verdict and motion for judgment notwithstanding the verdict.

For the reasons set forth herein and in Appellants' initial brief, Appellants respectfully request that this Court find that Plaintiff was a trespasser on Appellants' land to whom no duty was owed, that Plaintiff failed to prove that he fell within any exception to the general rule that possessors of land are not liable to trespassers for conditions on the land, and reverse the judgment entered in this matter.

II.

The trial court erred in denying the motion for new trial because an instruction that does not accurately state the substantive law of the theory of liability that is the basis for the verdict and that misdirects, misleads or confuses is prejudicial error in that Instruction No. 8, the verdict directing instruction, did not follow the substantive law of § 335 as it modified the requirement that "trespassers *constantly* intrude upon a limited area of land" to "trespassers *frequently* intruded upon the South entrance to Greenfield" and as a result allowed the jury to enter a verdict without making all the necessary factual findings under § 335.

In response to Point II, Respondent alleges that Instruction No. 8 "substantially" follows the substantive law of the Restatement (Second) of Torts, § 335, and that the use of the word "frequently" rather than "constantly" is merely a technical defect that causes no real harm. However, as previously explained under Point I, the finding that the Defendants had knowledge of trespassers "constantly" intruding upon a limited area of land is the lynch pin to the exception stated in § 335. It is the knowledge of "constant" trespass that brings forth the duty. *Seward*, 854 S.W.2d at 429-430. Without this finding, there is no duty, no liability, and the Plaintiff has no claim. *Id.* The rule of no duty to a trespasser is based on the possessor's inability to foresee the trespasser's presence in a particular area and therefore, it is the knowledge of *constant* trespassers in a limited area that brings forth the ability to foresee the presence of trespassers in that area and brings forth the duty. As a result, the modification of the word "constantly" to "frequently" is more than a technical defect; it is a fatal flaw constituting reversible error.

In addition, Respondent's contention that the Defendants were not prejudiced by this defect "because the fact that trespassers were constantly upon the South entrance to Greenfield was not a contested issue at trial" is false. (Resp. Br. 23) In support of his contention, Respondent pulls a sentence or two out of closing argument. (Resp. Br. 24) First, closing argument is not evidence and second, it does not support the giving of an instruction that does not accurately submit the law to the jury. Further, the statement by counsel in closing that trespassers "intruded all over" does not show that Defendants' had knowledge of *constant* trespassers on the limited area of the land were Plaintiff was injured.

Contrary to Respondent's contentions, the evidence at trial did not establish that Defendants' had knowledge of, or even that there was, constant trespassers upon the limited area where the Plaintiff was injured. *See* *Point I, supra, pp. 4-6*. In that regard, Point I is incorporated herein. Because the evidence did not establish that the Defendants had knowledge of constant trespassers upon the limited area where the wire cable is across the private road where Plaintiff was injured, the defect in the instruction did result in prejudice.

Instruction No. 8, the verdict directing instruction in this case, is not an accurate statement of the substantive law stated in § 335 of the Restatement (Second) of Torts. The deviation from § 335 takes the case out of that limited exception and out of that theory of liability. As a result, it was error for the trial court to submit the instruction to the jury, error for the trial court to accept the jury's verdict based on the erroneous and misleading instruction, and error for the trial court to deny the motion for new trial. This

error was pointed out to the trial court by objections to the instruction. (L.F. 68-73; Tr. 211-212)

Based on the foregoing, in the alternative to Point I, Defendants respectfully request that this Court find that Instruction No. 8, the verdict directing instruction, was prejudicially erroneous because it did not accurately state the substantive law of § 335 and reverse and remand this case for a new trial.

CONCLUSION

Based on the facts, law, and argument offered in this brief and in the Appellants' initial brief in support of this appeal, Appellants/Defendants respectfully request that this Court find that Plaintiff was a trespasser on Defendants' land to whom no duty was owed; find that Plaintiff failed to prove that he fell within any exception to the general rule that possessors of land are not liable to trespassers for conditions on the land; and reverse the judgment entered in this matter.

In the alternative, if this Court finds that § 335 has been adopted by Missouri and plaintiff made a sufficient case to submit that theory of liability to the jury, then Appellants/Defendants respectfully request that this court find that Instruction No. 8, the verdict directing instruction, was prejudicially erroneous because it did not accurately state the substantive law of § 335 and reverse and remand this case for a new trial.

Respectfully submitted,

LOWES & DRUSCH

By:_____

Albert C. Lowes #17061
2913 Independence
Cape Girardeau, MO 63703
Telephone: 573-335-7200
Facsimile: 573-335-8423

Attorneys for Appellants
Charles Glenn and Dale Glenn
d/b/a C & D Glenn Farms

RULE 84.06(c) CERTIFICATE OF COMPLIANCE

Albert C. Lowes, counsel for Appellants, pursuant to Mo.R.Civ.Pro. 84.06(c) hereby certifies to this Court that:

1. The Reply brief filed herein on behalf of Appellants contains the information required by Mo.R.Civ.Pro. 55.03.

2. The Reply brief complies with the limitations contained in Mo.R.Civ.Pro. 84.06(a) and (b).

3. The number of words in this Reply brief, according to the word processing system (Microsoft Word) used to prepare the brief, is 4878, exclusive of the cover, certificate of service, this certificate, the signature block and the appendix.

4. In compliance with Mo.R.Civ.Pro. 84.06(g), a floppy disk is filed with the brief that complies with Mo.R.Civ.Pro. 84.06(g) and said disk has been scanned for viruses and, according to the program used to scan for viruses (Norton), the disk is virus-free.

Respectfully submitted,

LOWES & DRUSCH

By:_____

Albert C. Lowes #17061
2913 Independence
Cape Girardeau, MO 63703
Telephone: 573-335-7200
Facsimile: 573-335-8423

Attorneys for Appellants
Charles Glenn and Dale Glenn
d/b/a C & D Glenn Farms

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two (2) copies of Appellants' Reply Brief and one (1) floppy disk was served upon the following attorney of record by sending same by U.S. mail, first class postage prepaid, this _____ day of August, 2004:

MR. FRED H. THORNTON III
P. O. BOX 40
113 WEST NORTH STREET
SIKESTON, MO 63801

Respectfully submitted,

LOWES & DRUSCH

By:_____

Albert C. Lowes #17061
2913 Independence
Cape Girardeau, MO 63703
Telephone: 573-335-7200
Facsimile: 573-335-8423

Attorneys for Appellants
Charles Glenn and Dale Glenn
d/b/a C & D Glenn Farms

APPENDIX

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